

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 08-1395

R.G. SKINNER AND SUSAN M.
SKINNER

APPELLANTS

V.

THOMAS L. SELIGA, PAULA J.
SELIGA, AND JAMES COX

APPELLEES

Opinion Delivered May 13, 2009

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT,
[NO. CV-07-2161-5]

HONORABLE XOLLIE DUNCAN,
JUDGE

REVERSED AND REMANDED

COURTNEY HUDSON HENRY, Judge

Appellants Susan and R.G. Skinner appeal from that portion of the trial court's order denying their request for attorney's fees. For reversal, appellants contend that the trial court erred by failing to grant their request because an award of fees was mandatory under the terms of the protective covenants. Appellants' argument has merit, and we reverse and remand for an award of attorney's fees.

On October 29, 2007, appellants filed suit against appellees Paula and Thomas Seliga. In their complaint, appellants alleged that the parties lived in LaRue Acres Subdivision, which is governed by protective covenants. Appellants maintained that the Seligas violated the covenants by digging a trench across the only road that provided access to the appellants' property. Appellants sought both injunctive relief and monetary damages sustained to their

BMW MINI Cooper allegedly caused by driving the vehicle over the ditch. The Seligas answered the complaint and filed a counterclaim alleging that appellants were violating the restrictive covenants by using their home for commercial purposes. Appellants subsequently amended their complaint to join as a defendant, appellee James Cox, another landowner in the subdivision.

After a hearing, the trial court ruled that the Seligas and Cox violated the restrictive covenants by digging the ditch across the road. The court thus granted appellants' request for injunctive relief and permanently enjoined appellees from engaging in any conduct that interfered with the road. The trial court refused appellants' claim for damages to their vehicle and also dismissed the Seligas' counterclaim. In addition, the trial court declined to award appellants attorney's fees, ruling that the parties would bear their own fees and costs. Appellants filed a timely motion for the trial court to reconsider its refusal to award attorney's fees. In this motion, appellants asserted that the protective covenants mandated an award of attorney's fees to landowners who file suit to enforce the covenants against violating landowners. The trial court took no action on the motion, and thus by rule, the motion was deemed denied after thirty days. *See* Ark. R. App. P.–Civil 4(b)(1). Appellants now bring this appeal.

As their only point for reversal, appellants contend that the trial court erred by denying their request for attorney's fees. Appellants equate the protective covenants with a contractual agreement and argue that the language of the covenant mandated an award of

fees. Appellees respond with the argument that appellants are not entitled to attorney's fees because they also pursued a tort claim for damages to their vehicle.

The standard of review for bench trials is whether the trial court's decision is clearly erroneous. *Smith v. Eisen*, 97 Ark. App. 130, 245 S.W.3d 160 (2006). However, we give no deference to the trial court's conclusions on questions of law. *Housely v. Hensley*, 100 Ark. App. 118, 265 S.W.3d 136 (2007).

In Arkansas, attorney's fees are allowed when authorized by contract or by statute. *Martin v. Scharbor*, 95 Ark. App. 52, 233 S.W.3d 689 (2006). A restrictive covenant is considered a private agreement that rests on the contractual basis of mutual obligation. *See White v. McGowan*, 364 Ark. 520, 222 S.W.3d 187 (2006); *Rickman v. Hobbs*, 253 Ark. 969, 490 S.W.2d 129 (1973); *Moore v. Adams*, 200 Ark. 810, 141 S.W.2d 46 (1940). By purchasing their properties, the parties in this case agreed to be bound by the terms of the protective covenants governing the subdivision, including provisions regarding attorney's fees. *See Damron v. Univ. Estates, Phase II, Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1995). Therefore, we agree with appellants that attorney's fees can be awarded consistent with Arkansas law pursuant to the terms of the protective covenants.

The protective covenants at issue in this case contain the following provision:

Any lot owner may enforce the provisions of this Declaration by seeking injunctive relief, monetary damages, and any other relief afforded them under the laws of the State of Arkansas or the United States of America. *A lot owner shall also be entitled to recover legal fees and costs, including reasonable attorney's fees, from any violating lot owner or owners in any enforcement action.*

(Emphasis supplied.) This provision uses the word “shall” when addressing a lot owner’s entitlement to attorney’s fees in actions to enforce the restrictive covenants. In construing any contract, courts must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. *Magic Touch Corp. v. Hicks*, 99 Ark. App. 334, 260 S.W.3d 322 (2007). The use of the word “shall” indicates mandatory compliance with the contract’s terms unless compliance would result in an absurdity. *Marcum v. Wengert*, 344 Ark. 153, 40 S.W.3d 230 (2001). In *Marcum*, the supreme court construed a provision in a lease that used the term “shall” in reference to attorney’s fees, and the court held that the provision mandated an award of fees. We must reach the same conclusion here. The provision plainly requires an award of “reasonable attorney’s fees” in enforcement actions against lot owners who violate the protective covenants.

Appellees are mistaken in their view that attorney’s fees cannot be awarded because appellants included a tort claim for damages in their complaint. Appellees’ argument is based on Arkansas Code Annotated section 16-22-308 (Repl. 1999), which provides statutory authority for an award of fees to prevailing parties in contract actions. The statute does not, however, permit an award of attorney’s fees in a tort case. *Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005). The rule upon which appellees rely arises from cases in which both contract and tort claims are pursued in a single action, where our courts hold that fees are proper under the statute only when the action is based primarily in contract. *Jiles v.*

Union Planters Bk., 90 Ark. App. 245, 205 S.W.3d 187 (2005). Here, however, appellants' request for fees is based on the contractual provision found in the protective covenants, not the statute. This agreement was enforceable according to its terms independent of the statutory authorization for attorney's fees set forth in section 16-22-308. *Marcum, supra*; *Griffin v. First Nat'l Bk.*, 318 Ark. 848, 888 S.W.2d 306 (1994); *Nef v. Ag Servs. of America, Inc.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002). Therefore, the appellants' inclusion of a claim for damages is no impediment to an award of fees authorized under the protective covenants.

In conclusion, we hold that the parties' agreement in the form of the protective covenants authorized and mandated an award of "reasonable attorney's fees." Therefore, we reverse and remand for the trial court to set an appropriate fee. *Marcum, supra*.

Reversed and remanded.

GLOVER and BROWN, JJ., agree.